

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDWARD J. LUMPKIN
Claimant

VS.

SHERWIN WILLIAMS CO.
Self-Insured Respondent

)
)
)
)
)
)
)

Docket No. **1,037,453**

ORDER

Claimant requests review of the March 6, 2008 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found claimant did not provide timely notice within 10 days after the date of injury. The ALJ further found that claimant did not prove "just cause" to extend said notice to 75 days.¹

The claimant requests review of whether timely notice was given pursuant to K.S.A. 44-520. Claimant argues that respondent has failed to meet its burden of proof that it was prejudiced by the alleged 32-day delay in claimant reporting his work-related injury.

Respondent argues the ALJ's Order should be affirmed.

The sole issue for determination on this appeal is whether claimant provided timely notice of his accidental injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Edward Lumpkin was working as a large batch paint maker. His job duties included transferring chemicals from bulk tanks to the mixing tanks and adding pigment to the paint

¹ See K.S.A 44-520.

which required heavy lifting. On October 8, 2007, he was moving around 55-gallon drums of chemicals so that they could be laid down on the floor. As he performed that activity he felt something pop in his back and experienced immediate pain.

Lumpkin testified that he told his supervisor, Victor Mejia, about the incident and was advised to go home and see his doctor the next day. Lumpkin sought treatment the next day with his physician, Dr. Lemons. The doctor ordered x-rays, prescribed some medication and physical therapy, and placed restrictions on Lumpkin. The respondent was unable to accommodate the restrictions.

Conversely, four witnesses testified on behalf of respondent and they denied claimant stated that he suffered back pain due to a work-related injury. The ALJ accurately detailed their testimony in the following fashion:

24. Claimant's supervisor, Victor Mejia, was the first witness to testify on behalf of respondent. Mr. Mejia admits that claimant approached him at work on October 8, 2007 at approximately 11:00 p.m. and told him that his back was hurting. This is the only statement on which claimant and Mr. Mejia agree. Mr. Mejia testified that he specifically asked claimant if his back pain was due to something he was doing at work, and that claimant said "no". Therefore, Mr. Mejia did not fill out an incident report and report the injury as work-related. He merely reminded claimant that he needed to see a physician in order to avoid receiving negative points per the employer's attendance policy.

25. Steve Guerrero, the production manager, was the second respondent witness to provide sworn testimony regarding notice. Mr. Guerrero was contacted by Vanessa Pereira, the HR generalist, and asked to review claimant's work restrictions and determine whether claimant could be returned to work. Claimant told Mr. Guerrero that the incident did not happen on company premises. Mr. Guerrero wanted to "double check" claimant's statement so he called Danny Badeaux, another manager, to witness the claimant's statement. According to Mr. Guerrero, claimant reiterated his statement that it didn't happen at work in front of Mr. Badeaux and Ms. Pereira.

26. Finally, Nancy Dinell, the Human Resources manager testified on the notice issue. Ms. Dinell spoke to claimant on October 9, 2007 and had almost daily contact by phone thereafter. She asked claimant whether the injury was work related, and he told her it was not.

27. Ms. Dinell admitted that claimant was advised to file for short term disability because the injury and subsequent absence from work were not work-related.

28. Claimant discussed his efforts to obtain short term disability with Leland Green, a union representative. Claimant did not advise Mr. Green that his injury was work-related.²

After his request for short-term disability benefits was denied Lumpkin filed a written claim for workers compensation benefits on November 8, 2007.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The ALJ determined that respondent's witnesses were credible and the preponderance of the evidence established Lumpkin did not provide notice within 10 days. And although Lumpkin did not provide notice within 10 days he did provide written notice within 75 days. Nonetheless, Lumpkin did not establish just cause for exceeding the 10-day notice requirement.

This Board Member finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the Lumpkin and respondent's representatives testify in person. In denying Lumpkin's assertion that he provided notice to his supervisor, the ALJ believed their testimony over Lumpkin's testimony and specifically noted respondent's witnesses were credible. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify. Accordingly, the ALJ's determination Lumpkin did not provide timely notice within 10 days after the date of injury. Moreover, the claimant did not meet his burden of proof to establish just cause to extend said notice to 75 days.

² ALJ Order (Mar. 6, 2008) at 4-5.

Lumpkin's counsel devotes a great deal of argument to the proposition that respondent must establish it was prejudiced before the delay to provide notice within 10 days can be used to disqualify a claim. In 1993, the legislature amended K.S.A. 44-520 to provide that the employee's failure to provide an employer with notice of an injury within 10 days of the injury acts as a bar to a workers compensation claim unless the employer or its agent had actual notice of the injury or the employee had just cause in failing to provide notice in which case the time limit for providing notice was extended to 75 days. In *Injured Workers of Kansas v. Franklin*, the Kansas Supreme Court addressed the amendment to K.S.A. 44-520 and determined:

Under the 1993 amendment, the employer does not have to prove that lack of timely notice prejudiced it in order for the lack of timely notice to act as a bar to an employee's workers compensation claim.³

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 6, 2008, is affirmed.

IT IS SO ORDERED.

Dated this 23rd day of May 2008.

DAVID A. SHUFELT
BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
Larry Shoaf, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

³ *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 846, 942 P.2d 591, 598 (1997).

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2007 Supp. 44-555c(k).